United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

w/affidavit

B
Pf's

75-4066

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4066

ANTOINE MIROI,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys, Of Counsel.

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CASES CITED

ISSUE PRESENTED

WHETHER THE DECISION OF THE BOARD OF IMMIGRATION APPEALS, AFFIRMING THE IMMIGRATION JUDGE'S DENIAL OF MIROI'S APPLICATION FOR WITHHOLDING OF DEPORTATION, WAS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION

STATEMENT OF THE CASE

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a, Antoine Miroi petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on March 3, 1975. That order dismissed an appeal from a decision of an Immigration Judge denying Miroi's application for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. §1253(h). Petitioner contends that the Board's order should be reversed as being arbitrary, capricious, and an abuse of discretion. This petition was filed April 3, 1975. Since that time the petitioner has enjoyed the automatic statutory stay of deportation which accompanies a petition for review under Section 106 of the Act.

STATEMENT OF FACTS

The petitioner is an alien, a native and citizen of Haiti, who entered the United States on or about July 22, 1971 as a nonimmigrant visitor for pleasure authorized to remain in the United States until August 30, 1971. He failed to depart at the expiration of his authorized stay, and has continued to reside and work in the United States since that time and in violation of the law.

On June 14, 1972 after Miroi's apprehension, the Immigration and Naturalization Service (the "Service"), commenced deportation proceedings with the issuance of an order to show cause and notice of hearing charging that he was deportable from the United States under Section 241(a)(2) of the Act, 8 U.S.C. §1251(a)(2) (T. 8).*

On August 15, 1972 at a deportation hearing before an Immigration Judge, wherein the alien was repre-

*References preceded by "T" are to the certified administrative record which has been filed with the Court.

sented by counsel, Miroi conceded his deportability and submitted an application for political asylum to the Service's District Director. As a result of that application, the Immigration Judge adjourned the hearing without date. On September 12, 1972 Miroi was interviewed by the District Director's office with regard to his application for asylum. On March 26, 1973 the District Director requested an advisory opinion from the Department of State concerning the validity of Miroi's claim of anticipated persecution (T. 11). That request contained a summary of information received from Miroi during the September 12th interview and was accompanied by four affidavits which Miroi had submitted to substantiate his claim. On April 10, 1973 the Department of State responded to that inquiry stating that there was no reason to believe Miroi should be exempted from regular immigration procedures. The Department of State also advised they were unable to conclude that Miroi would suffer the persecution he alleged (T.10). The District Director did not grant the petitioner's request for asylum and the Service proceeded forward with the deportation hearing.

At the continued deportation hearing on August 7, 1973 Miroi renewed his claim for political asylum and applied for the withholding of deportation pursuant to Section 243(h) of the Act (T. 7, p. 4). During that hearing, and again on October 5, 1973 and October 15, 1974 testimony was given by Miroi and his spouse in an attempt to substantiate the alien's claim of anticipated persecution. In response to Miroi's application for Section 243(h) relief, the Service trial attorney offered into evidence two advisory opinions obtained by the District Director from the Department of State in response to his inquiries regarding Miroi's request for political asylum.* Miroi's counsel also offered into evidence three affidavits which had previously been submitted to the

*These documents included the District Director's first request for an advisory opinion dated March 26, 1973 and the Department of State's response dated April 10, 1973 (T. 10, 11). In addition, on December 17, 1973 the District Director requested a second advisory opinion on the basis of an affidavit executed by Miroi on December 13, 1973 T. 14). The Department of State issued a second advisory opinion on May 30, 1974 restating its belief that Miroi's fear of anticipated persecution was unfounded and that he should not be exempted from normal immigration procedures(T. 13).

District Director and which had been forwarded to the Department of State in conjunction with the District Director's initial request for an advisory opinion.*

On October 31, 1974 the Immigration Judge rendered a decision denying the alien's application for withholding deportation under Section 243(h) of the Act, finding that Miroi had failed to sustain his burden of establishing that he would be subject to persecution within the meaning of that provision of the Act (T. 6). The Immigration Judge granted Miroi the privilege of voluntary departure in lieu of enforced deportation pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e). On October 31, 1974 the petitioner appealed the decision of the Immigration Judge to the Board of Immigration Appeals (T. 5). On March 3, 1975 the Board affirmed the findings of the Immigration Judge and dismissed the appeal (T.4).

*The District Director's transmittal letters, the Department of State's advisory opinions, and the affidavits submitted by Miroi in support of his claim were accepted into evidence by the Immigration Judge at the continued hearing on October 15, 1974 (T. 7, p. 47).

RELEVANT STATUTE

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, U.S.C. §1253 -

* * * * *

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

RELEVANT REGULATION

Title 8, Code of Federal Regulations (C.F.R. §242.17)
242.17 Ancillary matters, applications

* * * * *

(c) Temporary withholding of deportation.* * * The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application.

> The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed.***

ARGUMENT

POINT I

THE ATTORNEY GENERAL DID NOT ABUSE HIS DISCRETIONARY AUTHORITY IN DENYING PETITIONER'S APPLICATION FOR TEMPORARY WITHHOLDING OF DEPORTATION

A. General Background

Section 243(h) of the Act, 8 U.S.C. §1253(h), authorizes the Attorney General to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." Thus, the determination whether to withhold deportation rests wholly in the administrative judgment and opinion of the Attorney General or that of his duly authorized

delegate.* Muscardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969); United States ex rel. Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. §242.17(c); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that only where there is a clear probability of persecution to the particular alien is this discretionary authority to be favorably exercised. ChengKai Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968). See also Hyppolite v. Immigration and Naturalization Service, 382 F.2d 98 (7th Cir. 1967); Lena

*The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. 3.1.

v. Immigration and Naturalization Service, 379 F.2d 536 (7th Cir. 1967).

In examining the Broad exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. Muscardin v. Immigration and Naturalization Service, supra; Zupicich v. Esperdy, 319 F.2d 773 (2d Cir. 1963). Unless that determination is found to be without any rational explanation, to depart inexplicably from established practices or to rest on an impermissible basis, the Court should not substitute its judgment for that of the Attorney General. Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966); Vardjan v. Esperdy, 197 F. Supp. 931 (S.D.N.Y. 1961), aff'd., 303 F.2d 279 (2d Cir. 1962).

Accordingly, the issue before the Court is whether the Attorney General has abused his discretionary authority by denying the alien's application for withholding of deportation. Li Cheung v. Esperdy, 377 F.2d

819 (2d Cir. 1967); Kladis v. Immigration and Naturalization Service, 343 F.2d 515 (7th Cir. 1965).

B. The evidence before the Attorney General failed to establish a clear probability of political persecution.

From the facts of this case it is evident that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason. The reasons relied upon by him were neither arbitrary nor capricious. The decision did not inexplicably depart from established policies; nor did it rest on an impermissible basis such as an invidious discrimination against a particular race or group. The Immigration Judge followed the well-established rule; that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien. Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

Under 8 C.F.R. 242.17(c) the petitioner has the burden of establishing that he would be subject to

persecution. MacCaud v. Immigration and Naturalization Service, 500 F.2d 355 (2d Cir. 1974).

Miroi's contention that he would be subject to persecution if deported to Haiti is based on his allegation that he was the chauffeur of a former minister of justice in Haiti who was discharged from his post and exiled in 1962 by former President Duvalier. In support of his claim Miroi and his wife, also an alien illegally residing in the United States, testified that Miroi left Port-au-Prince, Haiti after his employer was discharged, and that Miroi assumed a different name during this period. They described the constant inquiries by the Tonton Macoute as to Miroi's whereabouts. In rendering his decision the Immigration Judge found that this testimony, and the bare assertions contained in the affidavits previously submitted by Miroi, lacked credibility and did not satisfy the alien's burden of proof under 8 C.F.R. §244.17(c) The Immigration Judge specifically noted that neither Miroi nor any members of his family had been politically active in Haiti and that Miroi had not been

included on any proscribed list by the Haitian Government. Despite the testimony regarding repeated visits by the Tonton Macoute, the Immigration Judge found these unsubstantiated allegations to be unconvincing.

It is respectfully submitted that the decision of the Immigration Judge, affirmed by the Board of Immigration Appeals, is supported by the record of these proceedings. The record reflects that neither Miroi's wife nor his children were ever harmed during Miroi's alleged refuge in Hinche, Haiti. Their claim that the secret police visited Miroi's home approximately three days a week for a nine year period (T. 7, p. 26) does not appear credible in light of Miroi's nonpolitical employment as a chauffeur for Mr. Belizaire for three years (T. 7, p. 11). Nor does the testimony by Madame Antoine Meleance, concerning her regularly scheduled visits to see her husband and her various pregnancies by Miroi, appear consistent with their description of intense police harassment. It is respectfully submitted that the petitioner has failed to substantiate his self-serving

testimony with any credible evidence, and therefore the Board of Immigration Appeals correctly affirmed the finding of the Immigration Judge.

C. The Immigration Judge did not err in admitting into evidence the advisory opinions obtained from the Department of State.

The petitioner contends that the Immigration Judge erred in "relying" upon the advisory opinions which the Service trial attorney offered into evidence at the deportation hearing. He complains that the opinion dated April 10, 1973 was based upon incorrect information transmitted by the District Director's office. He further contends that the opinion of April 10, 1973 does not carry the guarantees of reliability which the law demands. It is submitted that Miroi had the opportunity to submit any information he desired to substantiate his claim of anticipated persecution. This opportunity was again available to the petitioner when the District Director resubmitted the request to the Department of State on December 17, 1973. If in fact Miroi's allegations had any substance he was afforded many opportunities to present

this evidence to the District Director and the Department of State. Furthermore, assuming arguendo that the District Director's transmittal letter dated March 26, 1973 was partially inaccurate, the second request for an advisory opinion contained a new affidavit by Miroi reflecting any inaccuracy.

With respect to the introduction of that advisory opinion at the deportation hearing where Miroi's claim was considered "de novo", it is submitted that the Department of State's opinion "came from a knowledgeable and competent source" and were therefore admissible at the hearing. Asghari v. Immigration and Naturalization Service, 396 F.2d 391 (9th Cir. 1969). See also 8 C.F.R. §242.14(c). Such letters have been held admissible, Hosseinmardi v. Immigration and Naturalization Service, 405 F.2d 25 (9th Cir. 1969); Sheng v. Immigration and Naturalization Service, 400 F.2d 678 (9th Cir. 1968), cert. denied, 393 U.S. 1054 (1969); c.f. Namkung v. Boyd, 226 F.2d 385 (9th Cir. 1955), even though their quality may be questioned. Hosseinmardi, supra. The letter was

certainly of probative value and the fact that the Immigration Judge gave it any consideration may well have been the result of the petitioner's own failure to supply any credible or substantiated evidence in rebuttal to its conclusions.

It is also noted that the Immigration Judge, in reaching his decision, noted that independent of the State Department's conclusion this record did not justify the favorable consideration of Miroi's application for withholding of deportation. The Immigration Judge enjoyed the advantage of seeing and hearing the petitioner and his wife, and was in the best position to determine the accurace, reliability and truthfulness of the testimony. His evaluation thereof is entitled to great weight. Matter of Herreros, 11 I.& N. Dec. 772 (1966); Tisi v. Todd, 264 U.S. 131 (1924); Kokkinis v. District Director, 429 F.2d 938 (2d Cir. 1970); Sigurdson v. Landon, 215 F.2d 791, 796 (9th Cir. 1954).

The deportation hearing complied with all the requirements of a fair hearing. Sung v. McGrath, 339 U.S. 33 (1950). The petitioner was represented by counsel and was given the opportunity to be heard and to introduce evidence and credible witnesses on his behalf. 8 C.F.R.

§242.16. Absent any arbitrariness or abuse of discretion the decision of the Immigration Judge should be permitted to stand. If the petitioner's persecution claim was rejected twice in opinions of the Department of State, and again by the Immigration Judge when his contentions were heard de novo, it was not as a result of error on the part of the Immigration Judge but rather because the claim is frivolous.

CONCLUSION

THE PETITION FOR REVIEW SHOULD BE DISMISSED.

Dated: New York, New York

February , 1976.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for the Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys,
Of Counsel.

Form 280 A-Affidavit of Service By Mail
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CA 75-4066

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline P. Troia being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 19th day of February, 19 76 she served ~~a~~ 2 copy of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Leon Rosen, Esq.,
60 East 42nd St.
NY NY 10017

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

19th day of February, 19 76

Ralph L. Lee

RALPH L LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977